



FEDERAL ELECTION COMMISSION
Washington, DC 20463

Robert F. Bauer, Esq.
Graham M. Wilson, Esq.
Perkins Coie
700 Thirteenth Street, NW, Suite 600
Washington, D.C. 20005

MAR 12 2014

RE: MUR 6717
DNC Services Corporation/Democratic
National Committee and Andrew
Tobias in his official capacity as
treasurer

Dear Messrs. Bauer and Wilson:

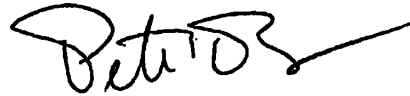
On February 6, 2013, the Federal Election Commission notified your clients, the DNC Services Corporation/Democratic National Committee and Andrew Tobias in his official capacity as treasurer ("Committee"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On March 6, 2014, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe the Committee violated 2 U.S.C. § 434(b)(2)(A), (b)(3)(A), (b)(5)(A) or (b)(8). The Commission also determined to dismiss the allegation that the Committee violated 2 U.S.C. § 434(b)(4)(H)(iii) and (b)(6)(B)(iii). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

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If you have any questions, please contact Mark Allen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg", with a long horizontal flourish extending to the right.

Peter G. Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

RESPONDENTS: DNC Services Corporation/Democratic National
 Committee and Andrew Tobias in his official
 capacity as treasurer

MUR 6717

FACTUAL AND LEGAL ANALYSIS

I. INTRODUCTION

 This matter was generated by a Complaint filed with the Federal Election Commission by Daniel Epstein, Executive Director of Cause of Action, alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), by Respondents.

II. FACTUAL AND LEGAL ANALYSIS

A. Background

 This matter involves the DNC Services Corporation/Democratic National Committee ("DNC") reimbursement to the U.S. Department of Health and Human Services ("HHS") for \$2,514.50 in travel costs of HHS Secretary Kathleen Sebelius and an aide to an event where Sebelius gave a speech in which she expressly advocated the election of President Obama. The Complaint alleges that the DNC and its treasurer failed to disclose the receipt of a contribution from HHS or a debt to HHS, failed to disclose the payments to HHS as independent expenditures, and inadequately disclosed the purpose of the payments, in violation of the Act.

 The DNC asserts in its Response that HHS did not make a reportable contribution to the DNC and the DNC did not incur a reportable debt to HHS, that the DNC had no role in the making of Sebelius's statements and thus bears no responsibility to disclose its payments as independent expenditures, and that the DNC adequately disclosed the purpose of its payments to HHS.

1 As set forth below, the Commission finds no reason to believe that the DNC failed to
2 disclose a contribution or a debt or failed to adequately describe the purpose of its disbursements.
3 In addition, the Commission dismisses the allegation that the DNC failed to disclose its
4 disbursements as independent expenditures. Finally, the Commission closes the file in this
5 matter.

6 **B. Facts**

7 On February 25, 2012, Sebelius spoke at a Human Rights Campaign ("HRC") gala in
8 Charlotte, North Carolina,¹ in her official capacity as HHS Secretary.² In addition to her
9 prepared remarks, Sebelius made several statements in support of President Obama's reelection
10 and Walter Dalton's candidacy for North Carolina Governor.³ Near the beginning of her speech,
11 Sebelius recognized several individuals in attendance, including North Carolina Lieutenant
12 Governor Dalton; she said he "needs to be the next Governor of North Carolina."⁴ Later in her
13 speech, Sebelius stated:

14 [O]ne of the imperatives is to make sure that we not only come together here in
15 Charlotte to present the nomination to the President, but we make sure that in
16 November he continues to be President for another four years

17 . . .
18
19

¹ Compl. at 4 (Feb. 1, 2013); *see also Human Rights Campaign, Events, 2012 HRC North Carolina Gala Dinner*, <http://web.archive.org/web/20111224014449/http://www.hrc.org/events/entry/north-carolina-annual-hrc-gala-dinner>.

² Most of the available facts are set forth in a Report by the U.S. Office of Special Counsel ("OSC") addressing complaints alleging that Sebelius violated the Hatch Act, which is attached to the Complaint. Compl., Ex. 5.

³ *Id.* at 3-4.

⁴ *Id.*

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1 [I]t's hugely important to make sure that we reelect the President and elect a
2 Democratic governor here in North Carolina⁵
3

4 Two days after the gala, HHS started receiving media inquiries about Sebelius's comments.⁶

5 HHS retroactively reclassified the event as political and issued a statement that because

6 Sebelius's trip included "political components," the federal government would not be paying for

7 it.⁷ HHS sought reimbursement from the DNC and the Obama for America campaign for the

8 costs of Sebelius's travel to Charlotte for the HRC event.⁸ Between March 9 and March 28,

9 2012, HHS, the DNC, and the Obama campaign communicated as to who would pay for the trip,

10 and concluded that "the DNC will be paying for this."⁹ The DNC disclosed a payment of

11 \$1,003.69 to HHS on April 12, 2012, for "travel" under "Other Federal Operating

12 Expenditures,"¹⁰ corresponding to Sebelius's travel costs.¹¹ The DNC disclosed a further

13 payment of \$1,510.81 to HHS on August 2, 2012, for "travel" under "Other Federal Operating

14 Expenditures,"¹² corresponding to the travel costs of an aide to Sebelius who accompanied her.¹³

⁵ *Id.* at 4.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Compl., Ex. 6 at 1-2.

¹⁰ See Compl., Ex. 8 (copy of DNC check payable to HHS); *id.*, Ex. 9 at 3 (DNC disclosure report page); DNC Amended May 2012 Monthly Report at 2660.

¹¹ See Compl., Ex. 5 at 4, Ex. 6 at 3.

¹² See Compl., Ex. 12 at 3 (DNC disclosure report page); DNC Amended September 2012 Monthly Report at 3027. OSC advised HHS on July 18, 2012, that there were some additional costs associated with Sebelius's attendance at the HRC event that needed to be reimbursed to the U.S. Treasury. See Compl., Ex. 5 at 4.

¹³ *Id.*, Ex. 11. In its report, OSC concluded that Sebelius violated the Hatch Act and that HHS sought and received reimbursement from the appropriate political entities for the travel-related costs of Sebelius's appearance at the HRC event. *Id.*, Ex. 5 at 7.

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C. Analysis

1. Disclosure as a Contribution and a Debt

The Complaint alleges that the DNC failed to disclose the receipt of a contribution from HHS in the form of a \$2,514.50 advance for travel costs for Sebelius and her aide.¹⁴ The Complaint also alleges that the DNC failed to disclose the travel costs as debts owed to HHS until they were paid.¹⁵

The DNC asserts in its Response that HHS did not make a reportable contribution to the DNC and the DNC did not incur a reportable debt to HHS.¹⁶ Specifically, the DNC claims that HHS did not provide anything of value to the DNC.¹⁷ The DNC also asserts that when travel to an event is not specifically authorized or requested by a committee, the payment for such travel is not a contribution.¹⁸ Further, the DNC says it had no obligation to pay HHS, as the travel costs were not incurred on behalf of the DNC.¹⁹

Even if HHS's payment of Sebelius's travel costs provided a thing of value to the DNC, under the Act the payment would not constitute a contribution. The Act and Commission regulations require political committees to report all contributions received from any "person," whether monetary or in-kind, during a given reporting period, as well as debts owed by such

¹⁴ Compl. at 8.

¹⁵ *Id.* at 8-9

¹⁶ Resp. at 3 (Aug. 13, 2013).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

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1 committees.²⁰ “Contribution” under the Act and Commission regulations includes any gift,
2 subscription, loan, advance, or deposit of money or anything of value made “by any person” for
3 the purpose of influencing any election for Federal office.²¹ The term “person,” however, “does
4 not include the Federal Government or any authority of the Federal Government.”²² For this
5 reason, the use of Federal Government funds is not a contribution, as recognized in the Act’s
6 legislative history.²³

7 HHS is an authority of the Federal Government, and therefore cannot make a contribution
8 under the Act.²⁴ Accordingly, HHS did not make and the DNC did not receive a contribution
9 when HHS advanced \$2,514.50 in travel costs. Since there was no contribution to the DNC, the
10 DNC had no obligation to disclose either the receipt of a contribution from HHS or, to the extent
11 the DNC had not reimbursed HHS for the alleged contribution, a debt owed to HHS. Therefore,
12 the Commission finds no reason to believe that the DNC Services Corporation/Democratic
13 National Committee and Andrew Tobias in his official capacity as treasurer violated 2 U.S.C.
14 § 434(b)(2)(A), (b)(3)(A), or (b)(8).

²⁰ 2 U.S.C § 434(b)(2)(A), (b)(3)(A), (b)(8); 11 C.F.R. § 104.3(a)(2)(i), (a)(4)(i), (d).

²¹ 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.52(d).

²² 2 U.S.C. § 431(11); 11 C.F.R. § 100.10.

²³ See H.R. REP. NO. 96-422, at 6-7 (1979), *reprinted in* FEC, *Legislative History of the Federal Election Campaign Act Amendments of 1979* (1983) at 190-91; MUR 4545 (Clinton/Gore '96 Primary Committee, *et al.*) (finding even if governmental entities paid more than a reasonable portion of costs related to candidates' train travel, such payments would not have constituted excessive contributions under the Act).

²⁴ See *id.*; 2 U.S.C. § 431(8)(A)(i).

2. Disclosure as Independent Expenditures

The Complaint also alleges that the DNC failed to disclose its payments of \$2,514.50 to HHS as independent expenditures in view of Sebelius's express advocacy in support of Obama and Dalton.²⁵ The DNC denies the allegation, asserting that it had no role in the making of Sebelius's statements and that it paid the associated expenses after the fact.²⁶

The Act and Commission regulations define "independent expenditure" as an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate that is not made in concert or cooperation with, or at the request or suggestion of, such candidate, the candidate's authorized political committee, a political party or their agents.²⁷ Sebelius's statements at the HRC event — "[I]t's hugely important to make sure that we reelect the President," and "[O]ne of the imperatives is to make sure that . . . in November he continues to be President for another four years" — expressly advocated the election of President Obama.²⁸ Under the Act, political committees must itemize disbursements to persons who receive an aggregate amount of over \$200 during a calendar year in connection with an independent

²⁵ Compl. at 9-10.

²⁶ Resp. at 4.

²⁷ 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

²⁸ A communication expressly advocates the election of a clearly identified federal candidate if it uses "phrases such as 'vote for the President,' 're-elect your Congressman,' 'support the Democratic nominee,' 'cast your ballot for the Republican challenger for U.S. Senate in Georgia,' 'Smith for Congress,' 'Bill McKay in '94,' 'vote Pro-Life' or 'vote Pro-Choice' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro Choice, 'vote against Old Hickory,' 'defeat' accompanied by a picture of one or more candidate(s), 'reject the incumbent,' or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'" 11 C.F.R. § 100.22(a). Here, Sebelius's statement uses the phrase "reelect the President."

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1 expenditure made by the reporting committee.²⁹ Committees shall also disclose their total
2 independent expenditures for the relevant reporting period and calendar year.³⁰ The DNC
3 disclosed \$2,514.50 in payments to HHS as “Other Federal Operating Expenditures” rather than
4 as independent expenditures.

5 Even assuming arguendo that travel expenses associated with speeches that expressly
6 advocate the election or defeat of a clearly identified candidate could constitute independent
7 expenditures, here, the likely amount of the expenditures that could be attributable to express
8 advocacy of a federal candidate would amount to only approximately \$1,250.³¹ Given the
9 minimal amount of the relevant expenditures, the Commission dismisses as a matter of
10 prosecutorial discretion the allegation that the DNC Services Corporation/Democratic National
11 Committee and Andrew Tobias in his official capacity as treasurer failed to disclose
12 disbursements to HHS as independent expenditures.³²

13 3. Disclosure of Purpose of Disbursements

14 The Complaint alleges that even if the DNC properly categorized the payments as “Other
15 Federal Operating Expenditures,” it nevertheless insufficiently described the purpose as “travel”

²⁹ 2 U.S.C. § 434(b)(6)(B)(iii); 11 C.F.R. § 104.3(b)(3)(vii). Committees shall report such independent expenditures on FEC Form 3X Schedule E. 11 C.F.R. § 104.3(b)(3)(vii)(C).

³⁰ 2 U.S.C. § 434(b)(4)(H)(iii); 11 C.F.R. § 104.3(b)(1)(vii).

³¹ Because Sebelius expressly advocated the election of a state candidate as well as President Obama, the \$2,514.50 would be allocated between the two candidates. *See* 11 C.F.R. § 106.1(a). The portions of Sebelius’s speech expressly advocating the election of the state candidate and Obama were roughly equal, and so the federal portion, at 50%, would be \$1,257.25. *See id.*

³² *See Heckler v. Chaney*, 470 U.S. 821 (1985).

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1 because the DNC failed to provide “sufficient specificity that the purpose” of the payments to
2 HHS was “to reimburse HHS for Secretary Sebelius’s violation of the Hatch Act.”³³

3 The DNC asserts in its Response that it properly described the purpose of its
4 disbursements as “travel” and that the Commission has identified “travel” as a description of
5 purpose that provides sufficient detail.³⁴

6 The Act and Commission regulations require political committees to report the name and
7 address of each person to whom an expenditure is made for a committee operating expense in
8 excess of \$200 per calendar year, together with the date, amount, and purpose of the operating
9 expenditure.³⁵ The relevant Commission regulation defines “purpose” as a “brief statement or
10 description of why the disbursement was made,” and identifies “travel” as a description that
11 meets the regulatory requirement.³⁶ “Travel” is also identified as an adequate purpose in the
12 Commission’s Statement of Policy: “Purpose of Disbursement” Entries for Filings with the
13 Commission,³⁷ and in the Commission’s instructions for committee disclosure forms.³⁸

14 The available information shows that the DNC paid \$2,514.50 to HHS for the travel
15 expenses of Sebelius and her aide, and the DNC disclosed these disbursements as “travel,” a
16 term the Commission recognizes as adequately descriptive. Accordingly, the Commission finds

³³ Compl. at 10-11.

³⁴ Resp. at 4.

³⁵ 2 U.S.C. § 434(b)(5)(A); 11 C.F.R. § 104.3(b)(3)(i).

³⁶ 11 C.F.R. § 104.3(b)(3)(i)(A), (B).

³⁷ 72 Fed. Reg. 887, 888 (Jan. 9, 2007). The Commission also lists “travel” on its website list of “Examples of Adequate Purposes,” last updated May 30, 2012, *available at* <http://www.fec.gov/rad/pacs/documents/ExamplesofAdequatePurposes.pdf>.

³⁸ See Instructions for FEC Form 3X and Related Schedules at 12, *available at* <http://www.fec.gov/pdf/forms/fecfrm3xi.pdf>.

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1 no reason to believe that the DNC Services Corporation/Democratic National Committee and
2 Andrew Tobias in his official capacity as treasurer violated 2 U.S.C. § 434(b)(5)(A) by failing to
3 adequately disclose disbursements to HHS. Finally, the Commission closes the file in this
4 matter.

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